afterwards be valid so as to charge the maker. Some notes are void by the common law, others made so by statute; there is, however, no essential difference between them. They are in both cases equally void, and without any binding efficacy on the maker. If then they are so, no good reason can be assigned why the holder of a note, made void by the common law, should recover, any more than the endorsee of a note made void by statute. In all these cases the common law and statutes use the same powerful language, to wit, that "*they never had a legal existence.*"

But, notwithstanding this express assertion, it must be admitted the case is hardly an authority to the point, since it there appeared that the note was endorsed a year after it became due, and was therefore open to the same defence as if in the hands of the payee; and besides, it seems to have been only a jury trial.

On the other hand, the desire to protect commercial paper, and the idea that the only defect in such a note is the illegality of the consideration, viz., the promise to stifle the prosecution, have led some courts to hold such notes valid in the hands of an innocent endorsee for value before maturity: *Clark* v. *Ricker*, 14 N. H. 44; *Wentworth* v. *Blaisdell*, 17 N. H. 275; *Hill* v. *Northup*, 4 N. Y. (Superior Court) 120.

Similar decisions have been elsewhere made on notes which were contrary to public policy, such as to pay for improper influence on legislative proceedings: *Meadow* v. *Bird*, 22 Geo. 246: *Thorne* v. *Yontz*, 4 Cal. 321; or to aid the rebellion: *Hatch* v. *Burroughs*, 1 Woods 448; or for gaming, when the statute does not make the contract absolutely void: *Haight* v. *Joyce*, 2 Cal. 64. See other instances in *Robinson* v. *Crenshaw*, 2 Stew. & Port. 276; *Grimes* v. *Hilderbrand*, 6 N. Y. (Superior Ct.) 620. The familiar rule being that if a note is expressly made null and void by a statute, it is so even in the hands of an innocent endorsee: *Lowe* v. *Waller*, 2 Doug. 736; *Unger* v. *Boas*, 11 Penna. St. 601; *Kendall* v. *Robertson*, 12 Cush. 156; but if the statute only makes *the consideration illegal*, the note is good in the hands of a bonâ fide holder. And strong words are necessary to have the effect to deprive the latter of a remedy against the maker. Thus, if a statute against liquor-selling declares that "all payments or compensations for liquors sold in violation of law should be held and considered to have been in violation of law, without consideration, and against law, equity and good conscience," a note given in payment for such liquors is not thereby invalid in the hands of a bonâ fide endorsee before maturity, without notice of such illegality: *Cazet* v. *Field*, 9 Gray 329. The simple word "void" would have had far more effect than all this periphrase.

EDMUND H. BENNETT.

Superior Court of New Hampshire.

GERRISH *v.* GLINES.

Where a negotiable promissory note was made payable upon a condition, and the condition was written below the note on the same piece of paper, *Held*, that the note and condition were parts of a single entire contract, and that the fraudulent removal of the condition, by tearing the paper, was such a material alteration as rendered the note void in the hands of a bonâ fide holder.

ASSUMPSIT, to recover the amount of two promissory notes, each dated July 15th 1872, and payable to O. J. Stickles & Co., or bearer, one for $66.74, six months from date with use, and the other for $250, one year from date with use, and each signed by the defendant. The action was sent to a referee by order of court, who at this term makes report that he finds due from the defendant to the plaintiff the amount confessed, and no more; and he reports his conclusions of fact and law as follows: "The plaintiff's writ is dated March 11th 1874, with general count, and the two notes above described were specified as plaintiff's claim, sought to be recovered in this suit. The defendant confesses the first note for $66.74; and as to the second note described for $250, says he never promised, &c. Reference to the writ, specification, plea and confession on file may be had. The plaintiff read said notes and put them in as evidence, and rested his case. On the back of said note for $66.74, is written and crossed as follows:—

"Demand notice waived.
"LEONARD GERRISH."

The other note for $250 was written on the back, "Demand notice waived. LEONARD GERRISH." The defendant offered to prove, did prove, and I find that when said defendant made and signed said note of $250, there was written on the same paper with said note, and under the defendant's signature to said note, and signed by said defendant and the payee of said note, the following, to wit, "Condition. This note is given on the following conditions: W. F. Glines, of the first part, agrees to work his territory faithfully and well; and O. J. Stickles & Co., of the second part, agree if W. F. Glines, of the first part, does not make one thousand dollars over and above what he pays for said territory, then the above note is void and of no effect. [Signed] O. J. STICKLES & Co., W. F. GLINES."

The plaintiff's counsel objected to the evidence of this condition, without showing first that the plaintiff had knowledge of it at the time he took or purchased said note. The evidence was ruled in, notwithstanding the objection, and the plaintiff took exceptions to said ruling. It appeared, from cross-examination of the defendant, that he did not "work all his territory faithfully and well," according to said condition, and from the plaintiff's testimony, without exception, that when he purchased said note, no such con-

dition was annexed to said note, and that he had no knowledge of this condition or agreement at that time, and that he paid a fair and full consideration for said note.

I find that said condition had been torn off, and before the plaintiff purchased said note. And I rule, under the foregoing facts, that such alteration avoided the note in the hands of an innocent endorsee, and that the plaintiff cannot recover said note in this suit under any view.

The questions of law thus raised were transferred to this court for determination by FOSTER, C. J.

Barnard, for the plaintiff.

Pike & Blodgett, for the defendant.

LADD, J.—Upon the facts found by the referee in this case, I am of opinion that his conclusions of law were correct, and that there should be judgment on the report accordingly. It is claimed by the plaintiff, in effect, that the note, and the condition written below it on the same piece of paper, are to be regarded as evidence of two distinct contracts, and treated as two separate instruments. I think that view cannot be sustained. The memorandum is entitled "Condition," and its first words are, "*This note* is given on the following conditions," &c. It seems to me beyond all question, that the condition is one part of a single entire contract, of which the note is the other; that the whole paper together must be treated as a single instrument, and that any division of it, whereby a negotiable promissory note, which had no legal existence before, was created, was such a material alteration as rendered the whole void; that it was, in fact, no less than a forgery, which would render the note thus brought into existence altogether void, even in the hands of a bonâ fide holder who paid a full consideration for it before maturity. The authorities, in this state and elsewhere, establishing the rule as to the effect of a fraudulent and material alteration or forgery of a negotiable promissory note, are too numerous and too familiar to require citation. My conclusion is, that the plaintiff cannot recover the $250 note, for both the reasons given by the referee.

CUSHING, C. J.—The note for $250, when issued by the defendant, was qualified by a condition annexed to it, and referring to it in such mode as to show that it was intended to remain

attached to it so long as it was in force, and probably until it was detached by consent of the defendant. The payment of the note was then dependant upon a contingency, and therefore the note was not negotiable: *Fletcher* v. *Blodgett*, 16 Verm. 26; *Fletcher* v. *Thompson*, 55 N. H. 408, and cases there cited.

Independently, therefore, of the effect produced upon the note by a material alteration, it is enough for this case that the action cannot be maintained in the name of this plaintiff. When the note was issued by the defendant it was not negotiable, and could not be made so without his consent. It appears to have been altered by tearing off the condition after it came into the possession of the original payee. It is not, therefore, the note which the defendant gave. He has a right to say *non in hæc fœdere veni*—I did not make this bargain. It is plain enough, in reason as well as in authority, that the endorsee in this case is in no better condition than the original payee. The maker of a *negotiable* note is bound by that note as he makes it, and against an innocent endorsee his defences are much restricted; but it is only the note which he actually made, and not a different note, which binds him in this way.

The case of *Johnson* v. *Heagan*, 24 Me. 329, is an authority to show that the removal of the written condition was a material alteration. It is not necessary, perhaps, to consider any further the effect of this alteration in avoiding the note. The cases of *Master* v. *Miller*, 4 Term 32; 2 H. Bl. 141; *Davidson* v. *Cooper*, 11 M. & W. 778; 18 Id. 343; *Powell* v. *Divitt*, 15 East 29, seem to show conclusively that the effect of such an alteration, made after the acceptance of the bill or giving the note, would not only be to avoid the note in the hands of an innocent endorsee, but also, if fraudulently done, to discharge the debt: *Gibbs* v. *Linabury*, 22 Mich. 479; *Benedict* v. *Cowden*, 49 N. Y. 396.

SMITH, J.—The principle, that the fraudulent removal of a memorandum originally attached to a note and qualifying the contract, constitutes a material alteration and destroys the note, is well established: *Benedict* v. *Cowden*, 49 N. Y. 376, and authorities there cited. The plaintiff is entitled to recover the amount confessed, and costs to the date of the confession, and the defendant is entitled to recover costs since that time.

Judgment accordingly.

The American cases on this head are all of recent date, and greatly resemble each other in the facts. A farmer is tempted by an offer appar-

ently advantageous to sign a conditional promissory note, or an instrument convertible into a promissory note. The condition is then torn off or the instrument altered, and sold to a bonâ fide buyer. The cases may be thus divided :—

I. Where no negligence is alleged in the signer of the instrument. Here the current of authority is that as the party did not intend to create a negotiable security, and the note sued upon is not the instrument given by him, there can be no recovery upon it; the condition being inseparable from the promise. In *Master* v. *Miller*, 4 T. R. 320, and the note thereto in Smith's Leading Cases, vol. i., pp. 1254, 1281, will be found the strongest statement of this doctrine. A material alteration of a promissory note made by the creditor after execution, and increasing or injuriously affecting the responsibility of the debtor, will avoid the note even in the hands of a bonâ fide holder, and although the alteration was such as to defy the closest scrutiny. The cases cited in *Gerrish* v. *Glines* are here in point; but it is remarkable that the question of negligence was raised in none of them. In *Johnson* v. *Heagan* and *Fletcher* v. *Blodgett*, the plaintiff was present at the signing of the note. In *Gibbs* v. *Linabay* and *Benedict* v. *Seaton*, the carelessness of the defendant was apparently never adverted to; and in the latter case ALLEN, J., delivering the opinion of the Court of Appeals, said : "The question whether the defendant by his act, negligent or otherwise, enabled the payee to commit a forgery and perpetrate a fraud on an innocent purchaser of the note, and, if so, as to the effect of such negligence or any want of proper care upon his liability on the note as altered by the severance of the memorandum, was not raised upon the trial, and cannot, therefore, now be made on this appeal."

II. But where on the pleadings or by the evidence the defendant's negligence sufficiently appears, it is for the court to sustain a demurrer to the plea or to give the jury binding directions. Thus, in *Douglass* v. *Matting*, 29 Iowa 498, where the defendant pleaded that he signed the instrument sued on believing it to be a duplicate contract of agency, not, however, alleging that he had read the contents, or that the note had been altered after signature, the demurrer was sustained by the Supreme Court, who held that the defence was insufficient, and the defendant had been defrauded "through his own gross negligence." That the burden is upon the defendant to show reasonable prudence is decided also in *Chapman* v. *Ross*, 56 New York 137, where a promissory note was signed as a duplicate contract of agency. The court below instructed the jury that if the paper sued on was never delivered as a note, the plaintiff must fail. This was held to be error, because it did not also appear that the defendant was guilty of no negligence. "It is necessary," said JOHNSON, J., "to hold firmly to the doctrine that he who, by his carelessness or undue confidence, has enabled another to obtain the money of an innocent person, shall answer the loss." So in *Taylor* v. *Atchison*, 54 Ill. 196, where the case was tried by the court, and in *Nebeker* v. *Cutsinger*, 48 Ind. 436, the negligence or diligence of the defendant was regarded as a question of law, the facts being undisputed. In the former, where the decision was put upon a local act, the defendant, who could read with some difficulty, signed the paper handed to him without reading it. It was held that he was not negligent in so doing; but that the plaintiff was in fault in taking the note from a patent-right agent, with whom he had no previous acquaintance. In *Nebeker* v. *Cutsinger*, the jury found a verdict for the defendant; but on special interrogatories they answered on the evidence that he could

read, and if he had read the paper offered for his signature, would have discovered the fraud. It was held that the court below should have given judgment for the plaintiff on the answers to the interrogatories. See also *Nebeker* v. *Cochran*, 14 Am. Law Reg. N. S. 697. In *Shirts* v. *Overjohn*, 60 Mo. 305, it was laid down (overruling *Briggs* v. *Ewart*, 51 Mo. 245; *Martin* v. *Smylee*, 55 Id. 577, and *Corby* v. *Weddle*, 57 Id. 452, so far as they are in variance) that when it appears that the party sought to be charged intended to bind himself by some obligation in writing, and signed his name, having full means of ascertaining for himself the true character of such instrument before signing it, but neglecting to avail himself of such means, and relying on the representations of another, signed and delivered a negotiable promissory note, he cannot be heard to impeach its validity in the hands of a bonâ fide holder. In *Putnam* v. *Sullivan*, 4 Mass. 45, a distinction was set up *arguendo* between endorsing a note through fraudulent misrepresentation, and endorsing a different paper from that which the party intended to sign; but it was held, that, whatever there might be in the distinction, an endorser "cannot avail himself of it but in cases where he is not chargeable with any laches or neglect, or misplaced confidence in others."

The English authorities are to the same effect. *Young* v. *Grote*, 4 Bing. 420, may be considered as the leading case. A check was filled in by an agent in such a way as to admit of the amount being increased without exciting suspicion. It was held that the loss must fall upon the customer, as the bank had been misled through his negligence. Best, J., quoted the general rule from Pothier that that one of two innocent persons shall suffer whose act occasioned the loss. *Swan* v. *North British Australasian Co.*, 2 H. & C. 184, virtually lays down the same rule, with the qualification that the negligence must be of some duty cast upon the party by law, and must be the proximate cause of the loss. In that case the plaintiff, who was a registered shareholder in the defendant company, signed and gave to his broker blank forms of transfer to be used in selling shares in another company. The broker not only filled in the forms fraudulently, but forged the attestations and stole the certificates from a locked box; *held*, that Swan had committed no such negligence as to estop him from bringing suit. The essential distinction comes out even more strongly by a comparison of *Ingham* v. *Primrose*, 7 C. B. N. S. 82, with *Scholey* v. *Ramsbottom*, 2 Camp. 485. In both cases negotiable securities were torn up by the maker, and afterwards picked up, pasted together, and fraudulently put into circulation. In the former case, however, it was held that the bonâ fide holder could recover, as there was nothing in the appearance of the bill to make a man of ordinary intelligence suspicious. Even if putting the halves together were a forgery, yet defendant by his conduct had led to plaintiff's becoming owner for value. But in *Scholey* v. *Ramsbottom*, where the rents were visible and the face of the check soiled and dirty, the holder was not allowed to recover. The question, therefore, is one of negligence, and of good faith as affected by negligence. In *Foster* v. *Mackinnon*, L. R. 4 C. P. 704 (1869), where the defendant endorsed a bill of exchange believing it to be a guarantee, the jury were directed that if defendant believed, &c., "and if he was not guilty of any negligence in so signing," he was entitled to a verdict. This was held a proper direction; but the jury having found for defendant, a new trial was granted because the verdict was against the weight of evidence on the question of negligence.

It follows that instructions which call

the attention of the jury from the question of negligence are misleading. In *Phelan* v. *Moss*, 67 Penna. St. 59, below the contract of agency was written a promissory note; and in *Zimmermann* v. *Rote*, 75 Penn. St. 188, a condition was written on the side of the note. In both cases the court below who decided that the alteration in the note sued on amounted to a forgery, and directed the mind of the jury to the evidence on that head, were overruled and the negligence of the defendant and good faith of the plaintiff held to be the points at issue. See also *Garrard* v. *Haddan*, 67 Penna. St. 82.

If in the pleadings, however, circumstances of imposition are alleged which tend to exonerate the party from the charge of negligence, the court will not sustain a demurrer, as the question is one of evidence for the jury. Thus in *Cline* v. *Guthrie*, 42 Ind. 227, the defendant pleaded that he signed his name on a piece of paper to show the agents for a hayfork how it was spelt; that they wrote a promissory note over it, and when he picked the paper up and asked what that meant, they snatched it from him and drove away. A demurrer to this plea was sustained by the court below, but overruled by the Supreme Court, who placed their decision on the ground that the note was never made or delivered, and drew the distinction between cases where the maker "has actually and voluntarily parted with the possession of the note, and where he has not." See to the same effect *Burson* v. *Huntington*, 21 Mich. 415. This distinction appears to be chiefly important as bearing upon the question of negligence. In *Walker* v. *Ebert*, 29 Wis. 194, the defendant, a German, could not read or write English. Evidence that he signed the note sued on believing it to be a contract of agency, and that the note was never delivered, was rejected by the lower court; *held* to be error, and new trial awarded. The decision is carefully put upon the ground that the evidence tended to disprove negligence, and is distinguished from *Douglass* v. *Matting*, *supra*, on that score by DIXON, C. J.; though it may be doubted whether the signing of an instrument drawn up by a stranger in an unknown language is not in itself gross carelessness. In *Brown* v. *Reed*, 79 Penna. St. 370, the defendant offered to swear that he signed a paper which on its face was a contract of agency, so arranged that if a portion on the right side were cut off, there would remain a promissory note. *Held* to be error, as the question of negligence was for the jury, and depended on whether the line of demarcation between the parts of the instrument was distinct and conspicuous: per SHARSWOOD, J.

Whitney v. *Snyder*, 2 Lansing 477, is a case difficult to reconcile with the current of authority. The defendant offered to prove that he signed the note sued upon believing it was a contract of agency. The rejection of this offer by the lower court was held error. "There are and must be some defences," says TALCOTT, J., "as to which even a bonâ fide purchaser purchases at his peril;" and the question was whether the party "intended to sign and put in circulation the note as a negotiable security." The only reference to the question of negligence was, apparently, in the opinion of the court, the judge remarking that this was a stronger case in this respect for the defendant than *Foster* v. *Mackinnon*, *supra*, which has been relied on as authority.

It is submitted finally that the various distinctions laid down in regard to the cases where one or two persons innocent of intentional wrong must suffer, come down to a question of negligence in him whose act made the loss possible. If he has neglected a duty imposed on him by law, if he has not exercised ordinary diligence, the loss should fall

on him. Whenever the decision has been put on other grounds, such as that the defendant never made or delivered the instrument, that he never voluntarily parted with it, that his mind did not go with the deed, that the paper amounted to a forgery, &c., it will be found that these facts either tended to show the absence of negligence, or were essential because issue had not been made on such negligence. Thus in *Burson* v. *Huntington*, *Walker* v. *Ebert*, *Cline* v. *Guthrie*, *Brown* v. *Reed*, *supra*, the offer of the defendant was in effect to show that he had been reasonably diligent. Forgery and theft are probably extreme cases; yet it has been repeatedly laid down that a negotiable instrument stolen and put in circulation can be recovered on; and in *Ingham* v. *Primrose*, *supra*, the court intimate that a forgery which the defendant by his negligence had made possible would not be a ground of defence against a bonâ fide holder. In *Chapman* v. *Rose*, *supra*, the question was fully and carefully decided in a manner which appears to satisfy common sense and reasonably protect the holders of negotiable securities. R. S. HUNTER.

Supreme Court of the United States.

WASHINGTON COCKLE ET AL. *v.* JAMES W. FLACK ET AL.

Where a commission merchant in Baltimore advanced to a pork packer in Peoria $100,000, for which he was to receive interest at the rate of 10 per cent. per annum, and a fixed commission for the sale of the product, to be paid whether it was sold by the commission merchant or not, it was properly left to the jury to decide on all the facts whether or not the commissions were a cover for usury, or were an honest contract for commission business in connection with the use of money.

The express agreement of 10 per cent. is not usurious, because lawful in Illinois though not so in Maryland: *Andrews* v. *Pond*, 13 Pet. 65, re-affirmed.

IN error to the Circuit Court of the United States for the Northern District of Illinois.

The opinion of the court was delivered by

MILLER, J.—Plaintiffs in error were engaged in the business of packing pork in Peoria, Illinois, and the defendants were commission merchants in Baltimore, in the fall of 1872, when the contract was made which is the foundation of this suit. There had been transactions between the parties the previous year in the line of their business, and with reference to the packing business of the approaching season. This agreement was made by letter. The substance of it is that defendants should advance to plaintiffs as it was needed, the sum of $100,000, which they were to invest in the hog product, at the rate of 80 per cent. of the money so advanced, and 20 per cent. of the money put in to the purchase by plaintiffs. Defendants were to have interest on the money